IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE S.SIRI JAGAN

THURSDAY, THE 20TH SEPTEMBER, 2007 / 29TH BHADRA, 1929

WP(C).No. 3847 of 2006(G)

PETITIONER:

P.R.YAMUNA, ASSISTANT TEACHER,
AIDED UPPER PRIMARY SCHOOL,
KALMANDAPAM,PALAKKAD DISTRICT.

BY ADV. SRI.P.K.SURESH KUMAR
SRI.K.P.SUDHEER

RESPONDENTS:

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1. THE STATE OF KERALA, REPRESENTED BY
ITS SECRETARY,DEPARTMENT OF GENERAL EDUCATION,
THIRUVANANTHAPURAM.

2. THE DEPUTY DIRECTOR OF EDUCATION,
PALAKKAD.

3. THE ASSISTANT EDUCATION OFFICER,
PALAKKAD.

ADDL.R4. THE MANAGER,
AIDED UPPER PRIMARY SCHOOL,
KALMANDAPAM, PALAKKAD DISTRICT.

ADDL.R4 IS IMPLEADED AS PER ORDER DATED 25.9.2006 IN I.A.NO.13352 OF 2006.

BY GOVERNMENT PLEADER SRI.BASANT BALAJI.

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD

ON 20/09/2007, THE COURT ON 20/09/2007 DELIVERED THE

FOLLOWING:

APPENDIX (WP(C) NO.3847 OF 2006)

PETITIONER'S EXHIBITS:

Ext.P1: Copy of Show Cause Notice dtd.11.2.2003.

Ext.P2: Copy of reply to Ext.P1 notice submitted by the petitioner.

Ext.P3: Copy of order dtd.3.9.2003 issued by R3.

Ext.P4: Copy of order dtd.14.11.2003 issued by R2.

Ext.P5: Copy of Revision Petition dtd.5.12.2003 submitted by the petitioner before R1.

Ext.P6: Copy of Order dtd.29.11.2005 issued by R1.

-True Copy-

P.A.to Judge.

S. SIRI JAGAN, J.

W.P (C).NO. 3847 OF 2006 - G

Dated this the 20th day of September, 2007

J U D G M E N T

The petitioner, a teacher in an aided school managed by the fourth respondent, challenges Exts.P3, P4 and P6 orders. Ext.P3 is the order of the Assistant Educational Officer, by which the punishment of barring of two increments without cumulative effect was imposed on the petitioner pursuant to disciplinary proceedings. Ext.P4 is the order of the Deputy Director of Education in appeal filed by the petitioner against Ext.P3 order. Ext.P6 is the order of the Government rejecting the revision filed by the petitioner. The petitioner is challenging these orders primarily on the ground that the procedure prescribed under Chapter XIV A of the Kerala Education Rules has not been complied with before imposing punishment on the petitioner. The petitioner's contention is that Ext.P1 is the first notice issued to the petitioner containing

charges levelled against her, in the disciplinary proceedings although she was earlier suspended. According to her, in Ext.P1 show cause notice itself, the A.E.O. had prejudged the guilt of the petitioner and after finding the petitioner guilty, without giving her any opportunity to file her explanation on the charges levelled against her, or without conducting any enquiry or other proceedings, straight away directed the petitioner to show cause as to why the punishment of debarring of three increments with cumulative effect should not be imposed on the petitioner. The petitioner had filed Ext.P2 reply to the same and without even referring to Ext.P2 reply, Ext.P3 order has been passed imposing punishment on the petitioner. The petitioner submits that the minimum the A.E.O. should have done as per the procedure prescribed is to issue a memo containing the charges levelled against the petitioner and direct the petitioner to show cause why disciplinary

action should not be taken against the petitioner for the misconducts alleged against her. Thereafter, the A.E.O. should have considered the explanation submitted by the petitioner and come to a definite conclusion as to the guilt of the petitioner and then only the question of imposition of punishment arises. The petitioner submits that such a procedure is conspicuously absent in this case and therefore, the disciplinary proceedings are clearly vitiated. In support of this contention, the petitioner also relies on a single Bench decision of this Court in **K.J.Sulatha and others** v. **State and others** (1993(2) KLJ 370).

2. The petitioner has got another contention that the A.E.O. could not have in the first instance initiated disciplinary proceedings by himself. According to her, under Section 12A of the Kerala Education Act read with Rule 75 A of Chapter XIV A of the Kerala Education Rules, it was incumbent on the A.E.O. to first

direct the manager of the school to initiate disciplinary proceedings against the petitioner and only if the manager fails to initiate disciplinary action, the A.E.O. could have directly initiated disciplinary action.

3. The petitioner also contends that the primary charge, which the petitioner has been found guilty of, is regarding the failure on the part of the petitioner to hand over charge to the Headmistress who was directed to be reinstated as Headmistress, while the petitioner was holding charge as Teacher-in-charge of the school. The contention of the petitioner is that although the Department had directed reinstatement of the Headmistress, formal order of reinstatement was not issued by the manager, without which the petitioner could not have validly handed over charge to the reinstated Headmistress. The petitioner also disputes the other charges. On these grounds, the petitioner would seek quashing of the impugned orders.

4. The learned Government Pleader, on the strength of the counter affidavit filed in this case, supports the impugned orders. He would point out that apart from the charge of failure to hand over charge to the Headmistress, there were five definite charges also which are stated in paragraph 3 of the counter affidavit of the first respondent. The Government Pleader would submit that in addition to that, there was one more charge, which was later added, to the effect that the petitioner signed the attendance register even after suspension. He would further point out that in Ext.P5 revision memorandum filed by the petitioner, she herself had stated that she was constrained to admit and confess irregularities committed by her although she says that it was due to ignorance of Service Rules. He would submit that prior to Ext.P1, disciplinary proceedings were actually initiated suspending the petitioner. It is submitted that only after conducting an

enquiry, Ext.P1 show cause notice has been issued to the petitioner. According to the learned Government Pleader, the charges levelled against the petitioner are very serious and therefore, the imposition of punishment of barring of two increments without cumulative effect is perfectly valid and proper.

5. I have considered the rival contentions in detail. First, I shall consider the second ground raised by the petitioner regarding the competency of the A.E.O. to initiate disciplinary proceedings without first directing the manager to do so. The power to directly initiate disciplinary action is contained in Section 12A of the Kerala Education Act, which reads thus:-

> "12A.(1) **Disciplinary powers of Government over teachers of aided schools.**— Notwithstanding anything contained in section 11 or section 12 and subject to such rules as may be prescribed, the Government or such officer, not below the rank of an Educational Officer, as may be authorised by the government in this behalf shall have power to

> take disciplinary proceedings against a teacher of an aided school and to impose upon him all or any of the penalties specified in the rules made under this Act.
>
> (2) The Government or the officer authorised under sub-section (1) as the case may be, may suspend a teacher on an aided school when any disciplinary proceedings is proposed to be taken against him under that sub-section or when such disciplinary proceedings are pending:
>
> Provided that--
>
> (a) before exercising the powers under sub-section (1) the Government or the authorised officer as the case may be, may intimate the manager regarding the circumstances requiring disciplinary action against the teacher concerned and give the manager a reasonable opportunity of taking disciplinary action; and
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> (b) if the manager fails to take appropriate action it shall be open to the Government or the authorised officer to take appropriate disciplinary action against the teacher concerned."

Rule 75 A of Chapter XIV A of the Kerala Education Rules further explains this power in the following words:-

"**75A. Disciplinary powers of the Government or the authorised officer:-** Notwithstanding anything contained in rue 75, if a manager does not initiate appropriate action against the teacher, within a month from the date of intimation as specified in Section12(A) or after intimation of the disciplinary proceeding he is not completing the disciplinary proceedings within two months from the date of intimation of the disciplinary action or if according to Government or the authorised officer, the manager dropped the disciplinary proceedings without sufficient grounds or imposed a penalty not proportionate to the gravity of charges proved,then the Government or the authorised officer as the case may be shall take appropriate disciplinary action against the teacher concerned. But in extraordinary cases for reasons to be recorded in writing the Director may on the application of the manager, extend the time allowed to the manager to complete the disciplinary action.

The procedure prescribed in rule 75 shall mutatis mutandis be followed by the Government or the prescribed authority in the matter of imposing major penalties."

Going by these provisions, it is abundantly clear that the power of the educational authority to initiate disciplinary action directly is only when in spite of direction to the manager to initiate disciplinary action against the teacher, the manager fails to do so. Under Section 11 of the Kerala Education Act, the appointing authority of teachers of aided schools is the manager, and therefore, the employer is essentially the manager. In an employer-employee relationship, the power to take disciplinary action against an employee is exclusively on the employer. Despite the restrictions imposed by the Kerala Education Act and Rules and despite the fact that it is the Government who pays the salary of the teachers, the manager of an aided school continues to be the employer of the teacher and but for Section 12A, the power of taking disciplinary action against the teacher rests exclusively with the manager. Prior to the introduction of Section 12A, a Full Bench of this Court

had in the decision of **Assistant Educational Officer** v. **P.R.Mamoo** (1968 KLT 556)(F.B.) had even gone to the extent of holding that rules 67, 75 and 77 of the K.E.R., to the extent they constitute original authority in officers (other than the Manager of the school) to take disciplinary action and to impose penalties on teachers in aided schools, as repugnant to the provisions of the Kerala Education Act and hence void to that extent. In that decision regarding the powers of the manager to take disciplinary action on teachers, it has been held thus in paragraphs 6 and 8 in the following words:-

> "6. It is contended vehemently by the learned Government Pleader that the power of dismissal is not vested by the Act in the Manager alone, as sub-section (2) of S.12 of the Act (quoted above) prescribes his authority to dismiss, remove or reduce-in-rank or suspend beyond 15 days to be subject to "the previous sanction of the officer authorised by the Government in this behalf." That sub-section does not confer a power of dismissal on anybody: it

only restricts the exercise of the power conferred elsewhere. The power it concedes to "the officers" is not to impose a penalty on teachers, but only to approve or disapprove the action of Managers in that regard. S.11 of the Act, read, as it ought to be, with S.15 of the Interpretation and General Clauses Act, is the only provision in the Act that constitutes authority to dismiss and therefore to remove or reduce-in-rank, or to suspend teachers of aided schools and that authority is the Manager and Manager only. ....."

"8. Shri.Easwara Iyer contended that under the scheme of the Act and the Rules, the Managers are only agents of the Government, who pays salaries to and is therefore the real master of the teachers of the aided schools. The short answer to this contention is, in the language of the Supreme Court (Vide: para 13 of the first cited precedent AIR. 1966 SC. 1081 C.B.) that as the Legislature has named the Manager as distinct from the Government, and specified the Manager to act under rules and conditions laid down by the

> Government, it is the Manager who has to act and not the Government itself. The fact that S.9 directs the Government to "pay the salary of all teachers in aided schools" does not mean that the Government can overlook the mandates of Ss.11 and 12 of the Act."

It was in view of the said legal position that Section 12A was introduced in the Kerala Education Act. Despite Section 12A, the authority to initiate disciplinary action against the teachers of an aided school still rests with the manager and only if, despite directions of the educational authorities to do so, the manager fails to initiate disciplinary action, the educational officer gets jurisdiction to take disciplinary action and not otherwise. When the Government arrogates to itself a power by a legislation, which power the Government would not have otherwise, such power has to be exercised strictly within the four corners of the statutory provision after fully complying with the

procedure prescribed therein, failure of which would render exercise of such power invalid.

6. I am fortified in this view by a judgment of a learned single Judge of this Court in **Thomas** v. **Regional Deputy Director of Public Instruction** (ILR 1976 (1) Kerala 477) in which in paragraph 8, the learned Judge held thus:-

> "8. Section 12A(1) is in wide terms and would empower Government and its officers to take disciplinary proceedings and impose the penalties (all or any) specified in the rules. But when as per the amended provisions rules were framed to carry into effect the amendment to the Act, what is provided therein curtails the disciplinary powers of Government or authorised officer to cases where a Manager does not initiate appropriate action against the teacher, within a month from the date of intimation as specified in section 12A or after intimation of disciplinary proceedings he is not completing the disciplinary proceedings within two months from the date of initiation of the disciplinary action. Rule 75A of Chapter XIVA of the K.E.R. is the

relevant provision. As per amended Rule 75 under sub-rule(1)(a) as it stands now the charge can be framed against a teacher only if the Manager is satisfied that there is a prima facie case, whereas under sub-rule 1 (a) as it stood prior to the amendment dated 10th March 1970 it was enough if the Educational Officer or any higher authority or any authority empowered by Government was satisfied. But that rule to the extent it constituted original authority in officers (other than managers of the school) to take disciplinary action and to impose penalties on teachers in aided schools were held repugnant to the provisions of the Act as it then stood in 1968 KLT 556. Though subsequently section 12A was introduced, Rule 75 was amended as stated earlier. If the Manager is intimated regarding the circumstances requiring disciplinary action as against the teacher he will have the discretionary action as envisaged by Rule 75, either to frame charge against the teacher or not to frame charges against the teacher. This discretion will depend on his satisfaction after a consideration of the circumstances intimated to the Manager by the Educational Officer. Even after charges have been framed against the teacher by the Manager, on receipt of the written

statement, the manager can still decide whether it is necessary to hold a formal enquiry or not, for before an enquiry is ordered, the Manager has to be satisfied himself as to whether a formal enquiry should be held, or not as would be evident from paragraph 2 of sub-rule (1) of Rule 75. Where the Manager is satisfied that no charges need be framed or when he is satisfied after perusing the written statement, that there is no case to go for a formal enquiry, he has got the liberty to drop the proceedings. In such cases Rule 75A cannot have any application, for refusal to frame the charge or to order a formal enquiry will not be a failure to take appropriate action against the teacher—see in this connection decision of a Division Bench of this Court in Sreedharan v. A.E.O., Pappinisseri. When the Manager asked the petitioner to submit explanation to charges mentioned in Ext.P1, the Manager has initiated appropriate action. Ext.P4 would also show that the Manager has come to definite conclusions in the proceedings after considering the teacher's explanation so that there is no scope for invoking that provision of Rule 75A which empowers the Government or the authorised officer to take appropriate disciplinary action

> themselves in cases where the Manager is not completing the disciplinary proceedings within two months of the initiation of the disciplinary action. No doubt, as I stated earlier and strongly put forth by Sri.Meloth, learned Government Pleader, section 12A(1) is in widest terms empowering the Government or its authorised officer to take disciplinary action against a teacher of an aided school and to impose punishment on him. But, the power as the section states is subject to such rules as may be prescribed. Therefore, in the light of Rule 75 and 75A, ti cannot be said that Ext.P7 proceedings have got any statutory sanction. Prescription of a proper rule might have helped the Government to intervene even in circumstances as in this case. Moreover, the power of revision given to Government under Rule 92 of Chapter XIV A of K.E.R. Is in unequivocal terms with respect to any order of a subordinate authority and the manager's decision is the decision of a subordinate authority under the Rules. That does not mean, however, that Government or its authorised officer can initiate disciplinary proceedings against a teacher of an aided school against the statutory rules."

I respectfully agree with the above decision.

7. I find that while rendering the above judgment, the learned single Judge had borrowed the words of a Division Bench of this court in **P.P.Sreedharan** v. **Assistant Educational Officer, Pappinasseri and others** (1974 KLT 53) holding that once the Manager initiates disciplinary proceedings pursuant to direction of the authorised officer and accepting the explanation of the teacher drops the proceedings, Rule 75A will have no application and failure to proceed further will not be a failure to initiate appropriate action against the teacher. In the words of the Division Bench itself, this is what has been held.

> "4. No doubt, it is true that if the manager is intimated regarding the circumstances requiring disciplinary action against the teacher, he will have the discretion as envisaged by rule 75 in Chapter XIV(A) of the Kerala Education Rules, 1959, for short, the Rules, either to frame charges against the teacher or not to frame charges against the teacher. This discretion will depend on his

> satisfaction after a consideration of the circumstances intimated to the manger by the Educational Officer (vide rule 75(1) of the Rules). It is also true that even after charges have been framed against the teacher by the manager, on receipt of the written statement the Manager can still decide whether it is necessary to hold a formal enquiry or not, for, before an enquiry is ordered, the Manager has to be satisfied himself as to whether a formal enquiry should be held or not (vide paragraph 2 of sub-rule(1) of rule 75 of the Rules). In cases where the Manager is satisfied that either no charge need be framed against a person or when he is satisfied after perusing the written statement that there is no case to go for a formal enquiry, he may drop the proceedings. In such cases, we conceive that rule 75A will have no application, for, the refusal to frame the charge or to order a formal enquiry will not be a failure to initiate appropriate action against the teacher. ....."

8. In the decision of **Krishnankutty Nair** v. **Director of Public Instructions** (1972 KLT 204), after

referring to the Full Bench decision in Mamoo's case (cited supra), another learned single Judge of this Court had held that since Section 12A has not been made applicable to non-teaching staff, it is not open to the department to contend that the power to take disciplinary action against a member of the non-teaching staff of an aided school by way of suspension is vested in the Government and that if the State wants to secure such power, it must vest itself with the authority in that behalf by appropriate statutory provision in that behalf. This decision also would indirectly lend support to the view I have taken.

9. In this case, the Government has no case that the A.E.O. had first directed the manager to initiate disciplinary action against the petitioner at any time and that the manager had failed to take action pursuant thereto. That being so, the very initiation of disciplinary proceedings against the petitioner without first

directing the manager to take disciplinary action is clearly without jurisdiction.

10. Apart from that, I find considerable merit in the contention of the petitioner regarding the first ground also. The petitioner has categorically stated that although the petitioner was initially suspended, and later reinstated, the first communication received by the petitioner regarding the charges against the petitioner was only Ext.P1. At the time of suspension, the question of issue of charge memo and calling for explanation does not arise. Although based on the counter affidavit, the Government Pleader tried to contend that earlier, notice was issued to the petitioner, he could not succeed in satisfying me that a charge sheet or any communication containing the charges levelled against the petitioner has been issued to the petitioner at any time before Ext.P1. What the Government Pleader relied on is paragraph 2 of the counter affidavit of the

third respondent wherein a reply dated 30.9.2000 filed by the petitioner is referred to. On a reading of that paragraph, it is clear that, that reply was in answer to the direction to the petitioner by the third respondent to hand over charge to the reinstated Headmistress and not in respect of any charge sheet or other intimation regarding charges levelled against the petitioner. In fact although three counter affidavits have been filed on behalf of the first, second and third respondents, none of the counter affidavits even mentions any earlier intimation regarding the charges against the petitioner prior to Ext.P1 with opportunity to reply to the charges. That being so, I have to accept the contention of the petitioner that Ext.P1 is the first communication regarding the charges against the petitioner. In Ext.P1, after detailing the allegations against the petitioner, what is stated in Ext.P1, in the concluding paragraph, is thus:-

> "It has proved without an element of doubt that you have committed serious violations under rule 11 and 12 of Chapter IX of KER and Rules on contemplated in Govt.Servants conduct rules and is punishable under rule 65 of KER Chapter XIVA and rule 11 of Kerala Civil Services Classification and Control and Appeal Rules, 1960 for dereliction of duty, in subordination, loss of Govt. property and money, all the above warrants a deterrent punishment and you are hereby given 10 days time, to submit you reply against a proposed punishment of debarring of 3 succeeding increments with cumulative effect in terms of Rule 65 of Chapter XIVA KER and Rule 11 of Civil Services Classification Control and Appeal act failing which it will be presumed that you have nothing to offer as your reply against the proposed punishment and things will be decided on merit."

It does not require any elaborate discussion to conclude that Ext.P1 has been issued finding the petitioner guilty of all charges against her and directing the petitioner to

show cause why the proposed punishment of debarring of three succeeding increments with cumulative effect should not be imposed on the petitioner. Therefore, it is abundantly clear that before entering the finding of guilt, no opportunity was granted to the petitioner to reply to the charges, without which no such finding could have been validly arrived at. Therefore, there has not been due compliance with the procedure prescribed under Rule 76 of Chapter XIVA of the Kerala Education Rules which is the procedure prescribed for imposition of minor penalties. The procedure prescribed in Rule 76 would certainly include an opportunity to the petitioner to file her representation on the charges levelled against her. That opportunity was not given before issuing Ext.P1 show cause notice. In the judgment referred to by the learned counsel for the petitioner, a learned Judge of this Court had categorically held in para 12 as follows:-

"12. In the show cause memo contemplated under Rule 76, the proposal to take disciplinary action against the delinquent, the specific misconduct alleged and the allegations on the basis of which, such action is contemplated are to be delineated and his explanation sought. After considering the explanation, the disciplinary authority has to take a decision whether the delinquent is guilty of the misconduct alleged against him and if he is found guilty, what would be the appropriate penalty to be imposed on him. As mentioned earlier, different penalties are provided under item (i),(ii) and (iii) of Rule 65. Depending upon the nature and gravity of the misconduct found against the delinquent one among the penalties can be imposed. A reading of Ext.P5 would clearly show that even before disciplinary proceedings were initiated against Thankamany, the 5th respondent had already come to a decision that a punishment of withholding promotion to higher post shall be imposed on him. It is open to the disciplinary authority to take a tentative decision even at the initial stage whether the misconduct is of such grave nature so that the procedure for imposition of major penalty contemplated under Rule

> 75 has to be followed or is it sufficient to follow the procedure under Rule 76 and impose a minor penalty. But the disciplinary authority cannot0. prejudge the particular penalty to be imposed on the delinquent before considering his explanation and entering a finding against him. Such an action would be unfair and arbitrary and against the spirit of the Rules. A similar view has been taken by the High Court of Punjab and Haryana in **M.L.Gara** v. **Chief Engineer I.W.Pb.** (1973(1) SLR 1076). Apart from the above, Ext.P5 memo does not even refer to the specific misconduct."

I am in respectful agreement with the above position of law as held by the learned Judge and the facts of that case are on all fours with those of this case. Therefore, the very basis of the disciplinary proceedings viz., Ext.P1 is vitiated both for want of compliance with Section 12A, and the procedure prescribed in Rule 76 as also for violation of principles of natural justice. Consequently, the original, appellate and revisional orders based on Ext.P1 show cause notice are clearly

vitiated. In view of my above finding, I do not find it necessary to consider the contention of the petitioner regarding the sustainability of the charges levelled against her. In the above circumstances, Exts.P3, P4 and P6 orders are quashed. Petitioner will be entitled to all consequential monetary and other benefits also including regularisation of the suspension period as duty.

The writ petition is disposed of as above.

S. SIRI JAGAN,
Mbs/ **Judge**

S.SIRI JAGAN, J

W.P.(C) NO. OF 2001

J U D G M E N T

DATED: 07-09-2007